FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 466

PARFAIT POWDER PUFF COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX.

PAGE

Petition for Writ of Certiorari 1
Summary Statement of Matter Involved 1
Jurisdictional Statement 4
Questions Presented 5
Reasons Relied on for Allowance of Writ 6
Prayer 7

Brief in Support of Petition for Writ of Certiorari ... 8
Opinions of courts below 8
Statement of the Case 8
Specification of errors to be Urged 9
Argument 9

I. The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this court:

First, the extent of the imputation of criminal responsibility for another's crime under the Federal Food, Drug and Cosmetic Act, and generally under criminal acts dispensing with scienter; and 9

Second, the scope of the exemption of section 303 (c) (1) of the act with respect to distributors acting in good faith and innocently purchasing cosmetics from manufacturers who by unauthorized and undisclosed substitution make and ship in interstate commerce adulterated cosmetics directly to distributors' customers 12

II. The Circuit Court of Appeals has rendered a decision in conflict on the same matter with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Hall-Baker Grain Co.* v. *U. S.*, 198 Fed. 614 14

Conclusion 15
Appendix 16

Cases Cited.

Arner Co. v. U. S., 142 F. (2d) 730 10
Barnes v. U. S., 142 F. (2d) 648 10
Casement v. Brown, 148 U. S. 615 11
Federal Trade Com. v. Pacific States Paper Trade Ass'n., 273 U. S. 52 13
Hall-Baker Grain Co. v. U. S., 198 Fed. 614 .....6, 14
N. Y. Central & Hudson River Co. v. U. S., 212 U. S. 481 10
People v. Morse, 131 Mich. 68 11
State v. Faulkner, 175 N. C. 787 11
U. S. v. Balint, 258 U. S. 250 10
U. S. v. Buffalo Cold Storage Co., 179 Fed. 865 10
U. S. v. Dotterweich, 320 U. S. 277 .....10, 11

Texts Cited.

Restatement of Law of Agency Sec. 2(3), 220(2) 11

Statutes Cited.

Criminal Code, sec. 332 (18 U. S. C. sec. 550) 10
Federal Food, Drug and Cosmetics Act, Act of June 25, 1938, 52 Stat. 1040, Ch. 675; U. S. C. Tit. 21, sec. 330 et seq.:
Sec. 301(a)—21 U. S. C. sec. 331a 2, 9, 14
Sec. 303(c)(1)—21 U. S. C. sec. 333(c)(1) ...12, 13, 14
Sec. 303(c)(2)—21 U. S. C. sec. 333(c)(2) 13
Federal Rules of Criminal Procedure:
Rule 37(b)(2) 4
Food and Drugs Act of 1906:
Act of June 30, 1906, 34 Stat. 768, ch. 3915 .....7, 14
Judicial Code, sec. 240a amended by Act of Feb. 13, 1925, 28 U. S. C. sec. 347a 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

PARFAIT POWDER PUFF COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Parfait Powder Puff Company, Inc., an Illinois corporation, respectfully shows to this honorable court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Neither the opinion of the circuit court of appeals nor that of the district court has been reported. They appear in the record respectively at pages 117-121, and 94-96.

Petitioner was convicted and fined on a criminal information (R. 2, Tr. 3) for its alleged violation of section 301 (a) of the Federal Food, Drug and Cosmetics Act (Act of June 25, 1938, 52 Stat. 1042, ch. 675; 21 U. S. C. sec. 331a) by unlawfully *introducing* and *delivering for introduction* (*not* causing such acts) into interstate commerce on seven occasions between August 3 and August 9, 1943, cosmetics which were adulterated in that they contained a

deleterious substance rendering it injurious to users under the conditions of use prescribed on the label.

A trial was had to the court without a jury (R. 10, Tr. 17) on a plea of not guilty (R. 9, Tr. 15). The court found the defendant guilty (R. 102, Tr. 207-8), overruled motions for acquittal at the close of the government's case (R. 55, Tr. 99) and for a new trial (R. 104, Tr. 213), and entered a judgment of guilty with a fine (R. 102, Tr. 207-8), which the circuit court of appeals affirmed (R. 122).

Petitioner's plant and offices were located at 1500 North Ogden Avenue, Chicago, Illinois, where it had leased 33,000 feet of space and had from 70 to 200 employees depending upon the season (R. 71, Tr. 128). Helfrich Laboratories, Inc., since 1920 or 1921 (R. 26, Tr. 47), was a private label manufacturer of cosmetics and semi-pharmaceutical products with its plant and offices on the fourth floor (R. 42, Tr. 75-6) of the premises at 564 West Monroe Street, Chicago, Illinois, selling nothing under its own label, and selling only to people who in turn distributed the merchandise which it usually manufactured (R. 17; Tr. 32).

In May 1943, petitioner was desirous of selling and distributing at wholesale a hair lacquer pad under its own trade name, "Locks-Up", and contacted Helfrich Laboratories, Inc., who submitted a sample hair lacquer which petitioner tested on its own employees and found satisfactory (R. 57, 58, Tr. 103-5).

Petitioner then entered into an oral contract with Helfrich whereby petitioner would supply Helfrich with flannel pads, jars, caps, labels, display cards and shipping containers, and Helfrich would, for a price of eight cents (8¢) per jar, impregnate the pads with lacquer as per sample, place them in jars with petitioner's labels thereon, and ship them directly to petitioner's customers, retailers in various states (R. 58-9, Tr. 105-7). The finished product sold for 20¢ per jar, so that Helfrich's charge represented 40%

of the finished cost. The lacquer represented about 80% of the weight of the finished product (R. 60, Tr. 107) and was purchased by Helfrich Laboratories alone from its own selected source of supply, Orchid Laboratories, then unknown to petitioner (R. 84, 78, 29; Tr. 150-1, 140, 53).

Petitioner would send Helfrich, by mail or personal delivery, duplicate typewritten copies bearing the same serial numbers, one with a number 4 and blue border and the other with a number 5 and orange border, which stated the name of petitioner's customer, the out-of-state destination and the quantities of the product to be shipped (R. 43, 60-1, Tr. 108-9). They were received by Helfrich about the date they bear and were all (with the exception of the rush shipment to Schuster in Milwaukee, Wisconsin) dated four weeks or more prior to their delivery by Helfrich to the common carriers (R. 112). In the interim they would be kept in date boxes by Helfrich's employees in Helfrich's shipping department as a record of orders they were to ship (R. 45, Tr. 80). These were the orders and "shipping directions" referred to as having been given by petitioner (R. 43, Tr. 77).

Helfrich Laboratories, Inc., itself purchased (R. 84, Tr. 150) and made up the lacquer, impregnated the pads, put them up in jars and packed them in the shipping containers in its own factory with its own employees (R. 43, Tr. 77-8). Helfrich's own paid employees filled out the shipping documents (which named petitioner as consignor) consigned to petitioner's customers in other states, and directly delivered the merchandise and documents to common carriers of Helfrich's employees' selection, all on Helfrich's own premises (R. 42-5, Tr. 75-81).

After its employees had shipped the merchandise to petitioner's customers, Helfrich invoiced the petitioner for its price, attaching to its invoices the orange bordered copy above referred to, on which its shipping employees rubber

stamped a form and inserted the information of the shipment. That was the first information petitioner had of the shipments made (R. 61-3, 43-4, Tr. 109-113, 78-9).

With respect to *all* the shipments in question, Helfrich Laboratories, Inc., without petitioner's knowledge or consent (R. 84, 67, Tr. 151, 120-1), substituted a gum (R. 84, Tr. 150) for the shellac it had been using in making the approved hair lacquer, and the resultant product, which it by its own employees delivered to the common carriers on its premises, was adulterated and was not as per sample (R. 66). The formula of the approved sample was Helfrich's and was unknown to petitioner (R. 66, T. 119).

The substitution was discovered by petitioner about two weeks later, and immediately ordered stopped, although not until at least a month later (R. 67, Tr. 119) was it learned that the product was injurious. Petitioner on October 8, 1943, sent a telegram (R. 98, Tr. 193) to all customers for the return of the products shipped during the two week period in which the substitution had been made. After discovering the substitution, petitioner purchased no more hair lacquer from Helfrich (R. 69, 29; Tr. 124-5, 53).

Petitioner furnished the Food and Drug Administration on request all documents and copies pertaining to the product and its delivery and Helfrich's name and address (R. 69, Tr. 123-4).

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by section 240(a) of the Judicial Code as amended by Act of February 13, 1925 (28 U. S. C., sec. 347a); and this petition is filed within 30 days after November 4, 1947, the date of the entry of the judgment of the circuit court of appeals for the seventh circuit (R. 122), as required by Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Can one be criminally liable for a Federal crime committed by another whom he has not aided, abetted, counseled, commanded, induced or procured to commit it, with whom he has not conspired to commit it, with whom he does not stand in any relationship of master and servant, fellow servant, principal and agent, partnership or conspiracy, and with whom he has only entered into a lawful contract in undertaking to perform which the criminal actor, without his knowledge or consent, has done an act which is in breach of the contract as well as in violation of the law, and which is promptly repudiated on its discovery?

2. Is a wholesale distributor of a cosmetic bearing his label a criminal violator of section 301(a) of the Federal Food, Drug and Cosmetic Act, where the manufacturer (long engaged in an independent calling as a private brand manufacturer), in undertaking performance of its contract with the distributor to put up and ship to the distributor's out-of-state customers a cosmetic product as per tested and approved sample, has, without the distributor's knowledge or consent and in breach of the contract, substituted a deleterious ingredient and made an adulterated cosmetic and itself delivered the adulterated cosmetic on its own premises by its own employees directly to the common carrier for interstate shipment to the distributor's customers, and prepared for and received from the carrier shipping documents naming the distributor as consignor?

3. If so, does not said act violate the Due Process Clause of the Fifth Amendment to the Constitution of the United States?

4. Does section 303(c)(1) of the Food, Drug and Cos-

metic Act relieve from the penalties of the Act a wholesale cosmetic distributor who has acted in good faith and made requisite full disclosure to the Food and Drug Administration, where, in undertaking performance of its contract with the distributor to put up and ship to distributor's out-of-state customers a cosmetic product as per tested and approved sample, the manufacturer (who has without the distributor's knowledge or consent and in breach of the contract substituted a deleterious ingredient and made an adulterated cosmetic bearing the distributor's label) himself delivered the adulterated cosmetic on his own premises by his own employees directly to the common carrier for interstate shipment to the distributor's customers and prepared for and received from, the carrier shipping documents naming the distributor as the consignor?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The circuit court of appeals has decided important questions of federal law which have not been, but should be, settled by this court: First, the extent of the imputation of criminal responsibility for another's crime under the Federal Food, Drug and Cosmetics Act, and generally under criminal acts dispensing with scienter; and Second, the scope of the exemption of section 303(c)(1) of the act with respect to distributors acting in good faith and innocently purchasing cosmetics from manufacturers who, by unauthorized and undisclosed substitution, make and ship adulterated cosmetics in interstate commerce directly to distributors' customers.

2. The decision of the circuit court of appeals is in conflict with the decision on the same matter of the circuit court of appeals for the eighth circuit in *Hall-Baker Grain*

Co. v. *U. S.*, 198 Fed. 614, involving section 2 of the Pure Food and Drugs Act of 1906 (34 Stat. 768, ch. 3915, Act of June 30, 1906) of which section 301(a) of the Federal Food, Drug and Cosmetic Act is a substantial reenactment.

PRAYER.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States circuit court of appeals for the seventh circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 9269, *The United States of America, plaintiff-appellee,* v. *Parfait Powder Puff Company, Inc., defendant-appellant,* and that the said judgment of the United States circuit court of appeals for the seventh circuit may be reversed by this honorable court, and that your petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just; and your petitioner will ever pray.

PARFAIT POWDER PUFF COMPANY, INC.,
By JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. .....

PARFAIT POWDER PUFF COMPANY, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinions of the courts below were not reported, but are in the record: that of the circuit court of appeals at pages 117-121, and that of the district court at pages 94-96.

STATEMENT OF THE CASE.

The material facts with reference to the origin and history of the case, jurisdiction and the issues and questions presented have been stated in the preceding petition.

SPECIFICATION OF ERRORS TO BE URGED.

The circuit court of appeals erred in affirming the judgment of the district court.

The circuit court erred in not reversing the judgment of the district court.

ARGUMENT.

I.

The circuit court of appeals has decided important questions of federal law which have not been, but should be, settled by this court.

First, there is the matter of the imputation of criminal responsibility for another's crime. The question has two aspects, both of vital importance, one affecting the administration of the Federal Pure Food, Drug and Cosmetic Act, the other affecting federal crimes generally, where *scienter* or *mens rea* are dispensed with.

The crime with which petitioner was charged was that of "introducing or delivering for introduction" into interstate commerce an adulterated cosmetic in violation of section 301(a) of the act. The act does not by its terms penalize a seller or purchaser for having made, or contracted to make, a sale or purchase, but prohibits only specifically described acts.

Helfrich Laboratories, Inc., (and its responsible officers) on the facts established in this record (by testimony of its own vice president and employees), was itself guilty of a

violation of the act. So holding is *Barnes* v. *United States*, (C. C. A. 9) 142 F. (2d) 648, and see *Arner* v. *United States* (C. C. A. 1), 142 F. (2d) 730, and *U. S.* v. *Buffalo Cold Storage Co.*, 179 Fed. 865. It was the manufacturer directly delivering to the common carrier for interstate shipment the very adulterated product it made.

Petitioner's criminal liability, if any, was necessarily only an imputed one, imputing to it the criminal act of Helfrich.

Since the contract between them was a lawful one and the substitution of the deleterious ingredient by Helfrich without petitioner's knowledge, there could have been no conspiracy and also no criminal liability under section 332 of the Criminal Code (18 U. S. C. sec. 550) as a principal, defined as one who "*directly* commits any act constituting an offense * * * or aids, abets, counsels, commands, induces or procures its commission."

The imputation is sought to be imposed by an extension of the doctrine of *United States* v. *Balint*, 258 U. S. 250, dispensing with *scienter* for certain classes of crimes, and *New York Central and Hudson River Railroad Company* v. *United States*, 212 U. S. 481, and *United States* v. *Dotterweich*, 320 U. S. 277, the former imputing liability to a corporate *principal* for the criminal acts of its officers and agents done in the ordinary course of the principal's business, the latter to a corporate officer for the criminal acts of *fellow-servants* under his established responsible supervision.

Going now beyond them, the circuit court of appeals has imposed an altogether new basis (for which it cites no precedent of this court and only cases of master and servant, R. 120) for imputing criminal liability to one other than the actor,—a doctrine of "instrumentality" and availing "of the acts of that instrumentality," without

requiring such instrumentality to be an agent, fellow-servant, partner or co-conspirator. The circuit court of appeals expressly disavowed the necessity for considering whether or not Helfrich was petitioner's agent. It was not petitioner's agent. Restatement of the Law of Agency, sections 2(3) and 220(2), *Casement* v. *Brown*, 148 U. S. 615.

It is the absence of an agency in this cause which obliged the court below to establish and resort to this doctrine of instrumentality.

Gone, now, are all personal liberty safeguards requiring aider, abetter, conspiracy, or representative status for the imputation of criminal liability for criminal acts of others. Now a lawful and innocent contract, prudently entered into in the ordinary course of business, *without more*, will impose criminal liability for the criminal act of the other party in breach of it, for every contract is an instrumentality for the accomplishment of the lawful objectives of the contracting parties.

Every innocent purchaser of cosmetics would become a criminal because a seller thereof has violated both contract and law by delivering adulterated products to a carrier, for every seller is an instrumentality by which a buyer procures an article or its manufacture for interstate shipment to him, and vice versa. Also, is it not more proper to say that petitioner was the innocent instrumentality whereby Helfrich committed its crime? Petitioner solicited its out-of-state customers for the sale of a tested and approved wholesome product. Helfrich used the medium of petitioner's sales to introduce into interstate commerce the adulterated product it manufactured and delivered to the carrier. Compare, *State* v. *Faulkner*, 175 N. C. 787, and *People* v. *Morse*, 131 Mich. 68.

In the *Dotterweich* case this court expressly condemned literalism in interpretation and limited imputed liability

only to those corporate officers or employees who "responsibly contribute" or have a "responsible share" in *furthering* the illegal transaction, or stood in a "responsible relation" (see pages 284, 285). The minority urged "it is a fundamental principle of Anglo-Saxon jurisprudence that guilt is personal and that it ought not lightly to be imputed to a citizen who * * * has no evil intention or consciousness of wrongdoing." Also, that "in the absence of clear statutory authorization it is inconsistent with established canons of criminal law to rest liability on an act in which the accused did not participate and of which he had no personal knowledge."

The doctrine established by the court below has not been settled by this court. It presents a perilous challenge to freedom of lawful contract, imposes obligations to be performed on another's premises beyond one's control and where his entry can be a trespass, and pledges one's personal liberty as forfeit for a stranger's crime (a high price) as an element of a lawful and innocent contract involving a distributor's purchase of foods and drugs, as well as cosmetics, from manufacturers for resales thereof, in sales made by the distributor in advance.

While the enforcement and administration of the Federal Food, Drug and Cosmetics Act is vitally affected, the principle is of more far reaching consequence, and is applicable to all federal crimes where *scienter* or *mens rea* are dispensed with.

It is a basic question worthy of, and requiring, determination by this honorable court.

Secondly, there is the question of the interpretation of the exemption newly granted in section 303(c)(1) of this act to persons who in good faith receive adulterated products in interstate commerce and proffer or make delivery of such articles to others. It is in addition to the

guaranty exemption of the 1906 act, reenacted in section 303(c)(2). Section 303(c)(1) has not been judicially interpreted before, and this case is one of first impression.

The court below determined that, so far as the purpose of the section was concerned, petitioner "has not received in interstate commerce the article complained of" (R. 120). That being the case, not even the guaranty exemption would avail petitioner, as it also applies only to one who has "received" the article (although not limited to receipt in interstate commerce), with the consequence that a common business practice of "drop shipments" (by the manufacturer directly to the distributor's customer) is outlawed. Form is made to govern substance. Because the manufacturer delivered directly to the common carrier for delivery to the distributor's customer out of state, the distributor has never *received* the article in interstate commerce. Actual physical receipt is made the criterion of the exemption from the penalties of the act.

Under the principle of *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 64, it is beyond debate that Helfrich was engaged in interstate commerce; and, if the circuit court's conclusion is based on the contrary (it has not so stated), its decision is contrary to the cited case. Helfrich bought the raw material, made the product, delivered it to the interstate carrier and charged petitioner a price as agreed. Absent any agency (which the court below does not find), petitioner is as much a purchaser of the product as is its own customer.

While petitioner did not receive the article physically, it received it constructively at some time in the course of Helfrich's performance of its interstate commerce contract, certainly not before the time when it would be obligated by its contract to pay Helfrich the price,—which time was when the goods had been shipped by Helfrich.

Its receipt was as effective as if it had received shipping documents consigned to itself which it reconsigned while the shipment was enroute. Substance, not form, should govern.

If for lack of physical receipt, neither this exemption nor the guaranty can avail petitioner and others seeking to do business on the same basis, the method of business is outlawed. The *new* exemption contained in section 303(c)(1) requires interpretation; and an important method of doing business should not be obliged to be nationally discontinued by the interpretation of a statute without the question having been settled by this honorable court.

II.

The decision of the court below is in conflict on the same matter with *Hall-Baker Grain Co.* v. *United States,* (C. C. A. 8) 198 Fed. 614, where a vendor of grain was held not criminally responsible under the 1906 act for misbranding by reason of the delivery by a warehouseman to the carrier for interstate shipment of an improper grade because of an error in grading by a state inspector. It was said that the act did not punish merchants conducting business in ordinary and approved methods "for the *mistakes of third persons over whom they have no control* nor for trivial errors of their own, which at first blush may seem to bring their action within the inhibition of the law, but which in reality they violate neither its letter nor its spirit." The case has never been disapproved.

Since section 301(a) is a substantial reenactment of section 2 of the 1906 act (which forbade anyone to "ship or deliver for shipment" an adulterated product in interstate commerce), it would ordinarily receive the same construction under the familiar rule that reenactments carry

with them the prior judicial interpretation of the statute reenacted.

Hence there is a conflict to be resolved by this honorable court.

CONCLUSION.

It is respectfully submitted that the questions involved in this case,—applying as they do to the large nationwide industries, foods and drugs as well as cosmetics,—have not been settled by this honorable court. The outlawry of an established method of business distribution common to all these industries is effectively accomplished by the decision of the court below, both by its interpretation of section 301(a) imputing criminal liability thereunder to the distributor and the denial of the exemption of section 303(c)(1) to the distributor, for now, to assure that the other contracting party will not commit a crime, one is also required to pledge his own personal liberty as an element of an innocent and lawful contract alone without regard to previous concepts of criminal participation or fiduciary status.

We believe that the principles involved are of such importance that a review would justifiably be undertaken by this honorable court in the public interest and urge that the writ of certiorari be granted.

Respectfully submitted,

JOSEPH ROSENBAUM,
Counsel for Petitioner.

HARRY H. RUSKIN,
Of Counsel.

APPENDIX.

Section 301(a) and (c) of the Federal Food, Drug and Cosmetic Act, Act of June 25, 1938, ch. 675, 52 Stat. 1042, 21 U. S. C. sec. 331(a) and (c), so far as material, provide as follows:

> "Sec. 301. The following acts and the causing thereof are hereby prohibited:
>
> (a) The introduction or delivery for introduction into interstate commerce of any * * * cosmetic that is adulterated or misbranded.
>
> (c) The receipt in interstate commerce of any * * * cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise."

Section 303(a) and (c), 21 U. S. C., Section 333 (a) and (c), so far as material, provide as follows:

> Sec. 303. (a) Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to * * * a fine * * *.
>
> (c) No person shall be subject to the penalties of subsection (a) of this section (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee only designated by the Administrator the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated Section 301(a) * * *, if he establishes a guaranty * * * [of the person] from whom he received in good faith the article * * * that such article is not adulterated * * *;"